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No. 14-940

In the Supreme Court of the United States

Sue Evenwel, et al.,

Appellants,

v.

Greg Abbott,
in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. When equalizing populations across electoral districts as required by the Fourteenth Amendment's Equal Protection Clause—the "one person, one vote" standard—is the relevant population to be equalized the number of people or the number of eligible voters?

2. Does the "federal analogy" to the U.S. House of Representatives, in which states are awarded representation based on total population, provide apposite guidance in answering Question 1?

3. Even if the "federal analogy" provides no support for a state unequally weighing voter strength, can this voter inequality be justified as a permissible side-effect of the racial gerrymandering which Section 2 of the Voting Rights Act has been interpreted to require?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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Amici's main concern here is that the crucial right to an equally weighted vote protected by the Equal Protection Clause of the Fourteenth Amendment—the "one person, one vote" standard—not be abrogated because of a false analogy to another part of that same amendment or by contorted interpretations of the Voting Rights Act.

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[1] Rule 37 statement: All parties lodged with the Clerk blanket consents to the filing of *amicus* briefs. Further, no part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

When this Court was asked more than 50 years ago to uphold grossly disproportionate state legislative districts, Alabama argued that states should be allowed to implement a "little federal system" that would be "framed after the Federal System of government—namely one senator in each county of the state." Brief for Appellant Reynolds at 14, 35, *Reynolds v. Sims*, 377 U.S. 533 (1964) (Nos. 23, 27, 41). This Court correctly realized then that "the federal analogy [is] inapposite and irrelevant to state legislative districting schemes." *Reynolds*, 377 U.S. at 573.

After all, the states are "separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government," *id.* at 574, whereas "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities, [but rather] have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.* at 575. Further, since "[t]he system of representation in the two Houses of the Federal Congress . . . [arose] from unique historical circumstances," *id.* at 574, "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted." *Id.* at 573.

Today, this Court is being presented with a new, 21st-Century version of the federal analogy, this time relating to the other chamber of Congress. Texas and its supporters are arguing that because the Constitu-

tion apportions seats in the House of Representatives by total population rather than voter population, states should be able to do the same for their own legislative districts.

This federal analogy works no better than the last one. Careful study of the history and purpose of both Section 2 of Article I and Section 2 of the Fourteenth Amendment shows that the rule they established is one for dealing with separate states that possess a great deal of legal autonomy—not least in defining for themselves how to select their congressmen (subject to congressional alteration, per Section 4 of Article I). That is not the case with respect to state legislative districts. Despite the Appellees' contentions, states' political subunits are simply not mini-states.

Federal apportionment is thus of no moment to intra-state districting and we are left with the simple principle this Court has consistently upheld, that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

Nonetheless, another argument has been put forward to justify violating this principle—that Section 2 of the Voting Rights Act requires gerrymandering state legislative districts to create majority-minority districts where possible, and that this "compelling interest" justifies the effect of unequal voter strength. This argument fails because even if the VRA does ask states to do such gerrymandering—a question for another time—such legislation cannot trump the Constitution. Where equal protection comes into conflict with the VRA, the latter must yield.

ARGUMENT

I. THE "FEDERAL ANALOGY" TO THE U.S. HOUSE IS INAPPOSITE

A. Courts Have Simplistically Relied on the Federal Analogy to Uphold Voter Inequalities

1. There is no disputing that the U.S. House allocates representatives by total population.

Before showing why the current federal analogy does not work, it is necessary to lay out why it may, at first blush, seem appealing. There is no question that the Constitution has, since its inception, awarded representation in the U.S. House to the states on the basis of total population. U.S. Const. Art. I, § 2, cl. 3. Accordingly, ever since the first census of 1790, there have been disparities in the relative voting power of those voting for House members from state to state. To point out one obvious example, "[s]ince no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I . . . 'weighted' the vote of voters in the slave States." *Wesberry v. Sanders*, 376 U.S. 1, 27 (1964) (Harlan, J., dissenting).

After the abolition of slavery, the infamous "Three-Fifths Compromise" was removed by the Fourteenth Amendment, but using total population rather than voter population remained the primary basis for allocating state representation. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding In-

dians not taxed." U.S. Const. Amend. XIV, § 2. Since the passage of that amendment, women have been given the vote and we no longer live in an era where "[even] in the most liberal of [states, the right of voting] has always been confined to a small minority of people." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866) [hereinafter Globe] (statement of Sen. Hendricks). Yet aliens, felons, minors, and others ineligible to vote do still reside in every state, and "some states have far more children or noncitizens in their populations, and some have far fewer of them," Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1261 (2012), so today the percentage of a state's population who are eligible to vote ranges from 62.6% in California to 78.8% in Vermont. *See* Figure 1, *infra* Part I.E.1.

As a result, real disparities in vote weight for the U.S. House exist from state to state, ranging from one representative for every 451,887 eligible voters in California to one representative for every 568,321 eligible voters in Vermont. *Id.* (Data equalized to eliminate the effects of rounding each state to a whole number of representatives. *See* note 2 *infra*, Part I.E.1.). The question that must be addressed, however, is whether such disparities *between* states mean it is constitutionally permissible to create disparities *within* states.

2. Courts have not thoroughly examined the history or purpose of the federal rule.

Ignoring the admonishments of the *Reynolds* Court, two circuit courts and the California Supreme Court have proffered the federal rule as a compelling indication that state allocation of representatives by

total population, rather than voter population, must be permissible. A state apportionment on the basis of total population has been held to "derive[] from the constitutional requirement that members of the House of Representatives are elected 'by the people' from districts 'founded on the aggregate number of inhabitants of each state,'" *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (citing *Federalist* 54 (Madison)), since "[t]he framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at later times, aliens." *Id.* That the federal rule could have been changed by the Fourteenth Amendment but was kept intact has likewise been put forward as support for allowing a similar system at the state level. "[T]he drafters of the Fourteenth Amendment . . . do appear to have debated this question, and rejected a proposal rooted in . . . the principle of electoral equality." *Chen v. City of Houston*, 206 F.3d 502, 527 (5th Cir. 2000). *See also Calderon v. City of Los Angeles*, 481 P.2d 489, 493 n.6 (Cal. 1971) "([I]t seems clear that total population—not voters—was the apportionment criterion envisioned by the framers of the Constitution.")

Scholars have also noted the superficial appeal of this federal analogy, but have left open the constitutional question of whether this analogy is determinative. *See, e.g.*, Sanford Levinson, *One Person, One Vote: A Mantra in Need of a Meaning*, 80 N.C. L. Rev. 1269, 1283 ("It may be, of course, that Section 2, properly interpreted, places constraints on Congress that the Equal Protection Clause does not place on the states themselves.") Neither courts nor scholars have actually examined the purpose behind the fed-

eral rule as demonstrated by its history, and this examination shows why the federal analogy is inapt.

B. The Federal Rule Was Created to Protect Federalism, Not Voter Equality

1. Allocating House members by eligible voters would present states with a perverse incentive.

The federal rule of apportioning House seats creates a division of power between state governments and the federal government in determining the representation of each state. As James Madison identified in *The Federalist Papers*, "[i]t is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate." *Federalist* 54. Thus, "the Constitutional Convention [reached] a fairly simple assessment of the balance of political power by counting population. . . . But the decision as to who among that population would vote was left to other governing bodies—an element of invisible federalism." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1249 (citations omitted).

Why was it so important to have this dichotomy, a single federal rule (total population) to determine every state's representation, coupled with individual state rules for determining the franchise? Suppose what would have happened if U.S. House seats had instead been allocated on the basis of eligible voters, but states had still been allowed to determine the eligibility of their residents to vote. The Framers direct-

ly confronted an analogous problem, that of having a direct popular vote for president while allowing each state to determine its own rules for suffrage. "There was one difficulty however of a serious nature attending an immediate choice [i.e. popular vote] by the people [for president]. The right of suffrage was much more diffusive [i.e. widespread] in the Northern than the Southern States . . . The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections." 2 Farrand's Records: The Records of the Federal Convention of 1787, at 57 (Max Farrand ed.) (1911).

In other words, simply by virtue of having a more liberal voting rule, northern states would have contributed more votes to the national total. Under such a system "a state's incentive to extend suffrage would no longer affect just that state." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1268. The natural concern is that states would "have incentives to change their own eligible voting population as a reaction to what another state has done," *id.*, and soon find themselves in a "race to the bottom," extending the franchise to younger and younger children, the mentally ill, and others who ought not wield it, all to gain an advantage in national elections. Such a system would clearly have been unacceptable.

Madison's federalist principle is the answer to the analogous problem in the House. It is the response to a hypothetical northerner, who objects to counting nonvoters in apportionment such as slaves who "neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the federal estimate of representation?" *Federalist* 54. Madison justifies his principle by noting that "[t]he qualifications on which the right of

suffrage depend are not, perhaps, the same in any two States. In some of the States the difference is very material." *Id.* This is why "the principle laid down by the convention required that no regard should be had to the policy of particular States towards their own inhabitants." *Id.* The allocation of representatives by total population, analogously to the allocation of presidential electors by total population, eliminated the problem of incentivizing states to gain greater representation in Congress simply by expanding their voting laws.

2. The Framers were correct to choose a federalist system of voter qualification over voter equality.

The Framers could have taken a different path than the one they chose, establishing a uniform criterion of voter eligibility nationwide and allocating representatives to states by eligible voters. The Convention did see a proposal to define a uniform standard of suffrage in House elections nationwide, limiting it only to freeholders. 2 Farrand at 201. But such a federal standard "would prevent the states from serving as the institutions that are most inclined to extend suffrage to new voters, as is historically the case, and would stifle the opportunity for new enfranchisement." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1265. Had we taken that path, Wyoming could not have extended the franchise to women as a territory in 1869 and upon statehood in 1890, paving the way to national acceptance. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 Nw. U. L. Rev. 1229, 1260 (2000).

The federalist system of congressional elections instead "permitted states to act as the first movers in

the expansion of enfranchisement," *id.* at 1254, the benefits of which ability were keenly felt when "the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter." G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 Penn St. L. Rev. 1133, 1147 (2011) (citing Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000)). Recognizing the importance of allowing states to be such first movers, the Framers rejected the proposal for a nationwide standard of suffrage. 2 Farrand at 206.

3. No similar federalist concerns exist at the intra-state level.

Because cities and counties do not have the same autonomy as states, such concerns about federalism are completely inapposite at the state level. No state allows different counties to define the franchise differently for state legislative elections. Indeed, the Constitution in defining suffrage for U.S. House elections assumes that the qualifications for voting for a state legislative branch will be uniform across a state, in that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," U.S. Const. Art. I, § 2, cl. 1. In Texas, as in all 50 states, the qualification for voting in state legislative elections is determined by state law, not local law. *See* Tex. El. Code Ann. § 11.002.

This Court has already recognized that states have no justification for using an electoral-college system rather than a popular vote in elections for statewide offices. *Gray v. Sanders*, 372 U.S. at 381.

The total population rule, just like the electoral college, is a solution to a purely federal problem.

C. The Federal Rule Was Intimately Tied to State Taxation

1. Apportionment by population checked the incentive to underreport population for tax purposes.

Why did the Constitution establish a rule that both representatives and direct taxes would be apportioned by the same standard, total population? In the Federalist Papers, Madison provides an explanation:

> As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.

Federalist 54.

This Court has previously recognized the importance of such opposing interests. "The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives . . . [was done partially so] the opposite interests of the states, balancing each other, would produce impar-

tiality in enumeration." *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 564 (1895) (citing *Federalist* 54). Total population, not voter population, was thought the fair measure for direct taxes, since population "had reference to the proportion of wealth." *Id.* (citing *Federalist* 54).

As it turned out, the mechanism largely did not work as the Framers intended. Federal direct taxes were "occasional and rare," imposed only three times in the first 40 years of the Constitution. I J. Story, Commentaries on the Constitution § 642 (5th ed. 1891). In fact, "[t]he last apportioned direct tax was the Act of Aug. 5, 1861, ch. 45, (12 Stat.) 292." Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clause)*, 21 Const. Comment. 355, 357 n.7 (2004). It was partially because of the rarity of direct taxes that the Fourteenth Amendment's framers were willing to enact a rule that partially delinked taxation from representation. *See, e.g.*, Globe at 3033 ("If I believed it probable that direct taxation would be resorted to in the future legislation of the country, nothing could induce me to support this proposition.") (statement of Sen. Henderson).

Eventually, the Constitution was amended to largely abandon this system of opposing state interests in enumeration altogether, allowing income taxes to be collected "without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Nonetheless, the fact that the original purpose of a constitutional design is no longer relevant should not obscure an understanding of what the original design *was*—which here in large part was a design motivated by fair taxation and incentives for fair census-taking, *not* a particular theory of representational equality.

2. Linking representation and taxation increased support for the Three-Fifths Compromise.

Records from the Constitutional Convention also show that linking congressional apportionment to taxation was inspired, in part, as a way to cement the Three-Fifths Compromise. Jensen, *Interpreting the Sixteenth Amendment*, 21 Const. Comment. at 375 (citing 2 Farrand at 106). Northerners could take solace that partially counting slaves also meant the South would pay more in direct taxes. Southerners were less eager to increase the ratio to five-fifths, knowing that doing so would also increase their direct taxes. "The controversy was therefore settled by imposing direct taxation upon the States in the same proportion in which they might be represented upon their slave population." Globe at 3033 (statement of Sen. Henderson). Although once again this purpose is no longer relevant today—and indeed may rightfully be seen as rather sordid—it sheds light on the motivations behind the constitutional design we have.

3. No such concerns are operative today at the state level.

There were several factors that produced the rule that ultimately arose from the Constitutional Convention, that representation in Congress and direct taxes would be mutually linked to total population. But the lesson this Court can take from these complexities is a very simple one: absolutely none of these issue, concerns, or compromises have any relation to the workings of the Texas government of 2015. Neither Texas nor any other state imposes direct taxes on its various subdivisions by total population. It was already recognized in 1866 that no state had bor-

rowed the federal Constitution's model, that "[i]t has been adopted in no State, in no county, in no town, in no municipal corporation, of apportioning taxation according to population." Globe at 378 (statement of Rep. Sloan). Nor has Texas suggested that chronic underreporting of population figures in its subdivisions might be a serious problem, one that would require the reward of representation based on total population to counteract.

D. The Federal Rule Was Preserved in 1866 to Ensure Virtual Representation for Women, not Aliens

1. The Fourteenth Amendment rejected a theory of virtual representation for nonvoting blacks.

"Virtual representation" is the democratic theory that where one person votes with the interests of both himself (gendered pronoun alas intentional) and other particular nonvoters in mind, the weight of his vote should somehow be increased to reflect the full number of those he is virtually representing. "The founding generation used concepts of virtual representation to . . . enabl[e] one entity to speak for—to virtually represent—another, larger one." Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1075 n.117 (1988).

Since the nation's founding, the concept of virtual representation for disenfranchised persons has been in an uneasy tension with the principles that led to the Revolution. "To say that men could be fairly represented by those whom they had played no part in choosing rang just as false as the royal claim that the colonists were adequately, if virtually, represented by

British members of Parliament." Keyssar, The Right to Vote 12 (revised ed. 2009). The legitimacy of virtual representation is, nonetheless, a necessary prerequisite to the legitimacy of justifying population-based districts on democratic grounds, since "the conclusion that [representing all interests equally] requires total population-based districting plans assumes that the non-voters in a district are 'virtually' represented by the voters in their district." Scot A. Reader, *One Person, One Vote Revisited*, 17 Harv. J.L. & Pub. Pol'y 521, 557–58 (1994).

Justice Harlan has gamely attempted to attribute a theory of virtual representation to the Framers' choice to (partially) include nonvoting slaves in the enumeration that determined state representation. "[I]t might have been thought that Representatives elected by free men of a State would speak also for the slaves. But . . . Representatives from the slave States could have been thought to speak only for the slaves of their own States, indicating . . . that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group." *Wesberry*, 376 U.S. at 27 (Harlan, J., dissenting). Derek Muller similarly suggests that "the Electoral College was founded upon a kind of republican vision of virtual representation in which a number of residents (including women, children, aliens, nonproperty owners, and, in part, slaves) would be included in a state's population tally." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1243. It is more likely that the (at least northern) Framers never truly believed the interests of slaves to be aligned with their masters, and only supported assigning slaves any weight in a state's enumeration out of expediency. But regardless, the *effect* of the Three-Fifths Com-

promise was indisputably one of virtual representation, since "[t]he power thus agreed upon could not be exercised by the fractional persons themselves, but as somebody else owned them, it was arranged that that same somebody else should own the political power also." Globe at 365 (statement of Rep. Conkling).

After the Civil War, when those slaves had been freed from any formal paternalistic relationship to their former owners, and had political interests that were diametrically opposed to those former owners, the notion of their being "virtually represented" by white voters went from dubious to patently absurd. Yet, without a change to the constitutional rule at the time, "the disenfranchised but freed slaves would count not as three-fifths in the apportionment of House seats but as five-fifths." Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia*, 60 Ala. L. Rev. 783, 819–20 (2009).

Members of Congress from free states that had little to no black populations, realizing the inequality in voting strength that would result, asked "in fairness, why should two Marylanders count equal to three Iowaians [sic]?" Globe at 767 (statement of Sen. Kirkwood). *Cf. id.* at 434 (statement of Rep. Ward); *id.* at 1255 (statement of Sen. Wilson). Rep. Donnelly analogized the outsized voting strength of white men in states with large black populations to the "rotten borough system" of the English Parliament. *Id.* at 377.

In response, some Democratic allies of the southern states, citing virtual representation principles, continued to make "the startling claim that members of Congress elected by white voters provided virtual representation for blacks, and thus a failure to pro-

vide representation for the black population would be taxation without representation." Scarberry, *Historical Considerations*, 60 Ala. L. Rev. at 842. One such claim was the speech of Rep. Phillip Johnson of Pennsylvania, who declared that reducing a state's representation by its number of nonvoting blacks would be to "limit the class of persons who shall be represented [in Congress] to white male adults" and "take away from the entire negro population, now all free alike, all representation whatever." Globe app. at 55 (1866). In the very same address, Rep. Johnson made appeals to a theory of virtual representation that would not sound wholly out of place coming from supporters of representational equality of populations (as opposed to voter equality) among legislative districts today. (Of course, knowing they were made in the context of freed blacks in the Reconstruction South, these sentiments now rightfully appear either hopelessly naive or disingenuous.)

> A faithful member of Congress represents the whole population of his district, male and female, black and white . . . If he relies wholly upon the voters of his district for the expressed wish of his whole constituency he may err, but not unless the voters are unfaithful representatives of the population behind them. And this is not likely to happen, because men's wishes, when intelligibly made, are found to be with their interests. The vote of the husband is supposed to represent the interests of his wife, and so the father those of his children, and these aggregated make up the public weal, commonwealth, or *respublica*.

Id.

Rep. Rogers of New Jersey spoke in similarly glowing terms of the principle of full representation for all persons, disenfranchised or not. "What is there more democratic and republican in the institutions of this country than that the people of all classes, without regard to whether they are voters or not, white or black, who make up the intelligence, wealth, and patriotism of the country, shall be represented in the councils of the nation." *Id.* at 353. *Cf. Daly v. Hunt*, 93 F.3d 1212, 1226 (4th Cir. 1996) ("[R]epresentatives should represent roughly the same number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative."); *Calderon*, 481 P.2d at 493 ("Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.")

But the enactors of the Fourteenth Amendment *rejected* these arguments of representational equality as being in the best interest of freed slaves, recognizing that under the then-current system "the negro of the South . . . has his vote cast for him . . . by his white and hardly more loyal neighbor," Globe at 2498 (statement of Rep. Broomall), and that "if men have no voice in the national Government, other men should not sit in this Hall pretending to represent them." *Id.* at 377 (statement of Rep. Donnelly). The enactors thus explicitly included in that amendment the *only* exception to the federal rule that congressional seats are allocated by total population. "But when the right to vote at any election for . . . Representatives in Congress . . . is denied to any of the

male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. Amend. XIV, § 2.

In other words, if a state did not allow blacks to vote, and blacks represented 40% of adult male citizens, the congressional allocation would be based on the total population of the state decreased by 40%. Thus, the only time that drafters of the federal rule confronted a situation where nonvoters would obviously not be virtually represented, and were not guaranteed to obtain the vote in a definite period of time, the drafters eliminated those nonvoters from the apportionment calculus. As we show *infra*, Part I.D.3, these criteria have come to perfectly describe the position of aliens today.

2. The Fourteenth Amendment retained the population rule to ensure women would be represented.

Why, with the theory of virtual representation so clearly repudiated in the case of freed slaves, did the Fourteenth Amendment not move fully to a voter-based system of apportionment? Such proposals were made and debated. "[W]e have had several propositions to amend the Federal Constitution . . . all embrac[ing] substantially the one idea of making suffrage instead of population the basis of apportioning Representatives; or in other words, to give to the States in future a representation proportioned to their voters instead of their inhabitants." Globe at

141 (statement of Sen. Blaine). *See* proposals of Rep. Schenck, *id.* at 9, Rep. Stevens, *id.* at 10, Rep. Broomall, *id.*, Rep. Sloan, *id.* at 378, Rep. Orth, *id.* at 380–81, and Sen. Doolittle, *id.* at 2942.

In support of retaining the population-based rule, Sen. Hendricks defended the theory of virtual representation, but *only* in the context of family members, not aliens. "The theory is that fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own." *Id.* at 2962. Similarly, Sen. Fessenden, chairman of the amendment's drafting committee, suggested that wives plausibly had tangible effects on the votes of husbands in a way that nonvoters outside the family structure did not have, and thus were fairly counted in representation. "I could hardly stand here easily if I did not suppose I was representing the ladies of my State. I know, or I fancy I know, that I have received considerable support from some of them, not exactly in the way of voting, but in influencing voters." *Id.* at 705.

With the virtual representation of women in mind, Sen. Hendricks voiced objection to a voter-based system of representation because "new States to a great extent are settled by emigration from the older States, and it has been and will ever continue to be the case that a much larger proportion of this emigration are male. The consequence is that the newly settled States contain a very much larger proportion of males than the older States, and therefore a much larger ratio of voters." *Id.* at 2962. According to Sen. Blaine, who likewise opposed changing the rule, this disparity was indeed substantial, with "[t]he ratio of voters to population . . . varying in the [nineteen free

states] from a minimum of nineteen per cent. to a maximum of fifty-eight per cent." *Id.* at 141. It was thus primarily for the protection of virtual representation for nonvoting women (read: wives) that the population basis for apportionment was retained in 1866, *not* for the virtual representation of aliens.

3. Aliens were retained in apportionment for several reasons unrelated to virtual representation.

Does the continued inclusion of nonvoting aliens in the allocation of representatives lend support to a notion that the drafters of the Fourteenth Amendment *did* think that aliens were virtually represented? In fact, George Smith provides a representative list of 12 instances where the issue of aliens in apportionment was discussed in congressional debate over Section 2, by supporters and opponents of the amendment alike, and in *none* of these instances is it suggested that aliens' interests were virtually represented by voters living near them, nor that aliens' interests were served by maintaining state "representational equality." Smith, *Republican Reconstruction and Section Two*, 23 Western Pol. Q. at 851 n.146.

First and foremost, congressional debate shows that nonvoting aliens were kept in a state's apportionment total for precisely the reasons discussed in Part I.B., *supra*. To do otherwise would have been to give states an incentive to grant the vote to as many of its resident aliens as possible. This rationale was explicitly put forward in opposition to suffrage-based representation multiple times. "There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters, and all conservative restrictions, such as the re-

quirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. Foreigners would be invited to vote on a mere preliminary 'declaration of intention.'" Globe at 141 (statement of Sen. Blaine). Similarly, Rep. Conkling, a member of the drafting committee, suggested that "[i]f voters alone should be made the foundation of representation . . . [o]ne State might let women and minors vote. Another might . . . give the ballot to those otherwise qualified who have been resident for only ten days. Another might extend suffrage to aliens. This would lead to a strife of unbridled suffrage." *Id.* at 357. And Sen. Fessenden, the chairman, likewise worried of "an unseemly race between States to increase their political power by increasing the number of their voters." *Id.* at 705.

Once again, establishing a uniform nationwide standard of the franchise would have been necessary to solve this problem, as one proponent of moving to suffrage-based representation fully admitted when he proposed an amendment "making the qualification universal . . . that qualified male electors, citizens of the United States of the age of twenty-one years and upward, shall be the basis of representation." *Id.* at 378 (statement of Rep. Sloan). But once again, for reasons of federalism, "there was considerable opposition within both the Committee itself and Congress as a whole to any measure that would strip the states of their power to control suffrage and elections. . . . [T]he Committee rejected two proposals that would have given Congress express control over 'elective' rights and 'the elective franchise.'" Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and*

the Right to Representation, 45 Hastings L.J. 1121, 1178 (1994) (citations omitted).

Rep. Bingham, the committee member considered the primary author of the Fourteenth Amendment, felt the need to reassure that "this amendment takes from no State any right that ever pertained to it. . . . The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States." Globe at 2542. Likewise in the Senate, Sen. Howard stressed that "[t]he second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." *Id.* at 2766.

Further, nonvoting aliens were not treated as a serious democratic problem by the drafters of the Fourteenth Amendment because it was assumed that all would, after a fairly short and uniform period of time, become citizens and therefore voters. Rep. Conkling remarked that, at the founding, the question of "how [aliens] should be treated during the interval between their arrival and their naturalization, during their political nonage . . . was disposed of in the liberality in which the Government was conceived. The political disability of aliens was not for this purpose counted at all against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment." *Id.* at 356 (emphasis added).

In 1866, many states actually allowed aliens to vote even *before* they had attained citizenship. "Up to 1875 over half the states allowed aliens to vote if they met certain other requirements, like residence." Peter Odegard, The American Republic 76 (1964). This progress toward the franchise was put forward as the

reason for counting aliens *in contrast to* the virtual-representation justifications for counting women. "The road to the ballot is open to the foreigner; it is not permanently barred. It is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother." Globe at 3035 (Sen. Henderson).

More specifically, since enumerations were taken only every 10 years, it was assumed that most of those aliens counted would become voters before the next census. Rep. Kelley asked with rhetorical understatement "whether it is not possible that the male minor may come to an age that will secure him the right to vote; and whether it is not possible for the unnaturalized foreigner also to acquire that right; and whether . . . both may acquire it in the current decade." *Id.* at 354. Rep. Kelley explicitly contrasted the position of the nonvoting alien with that of the "freeman who can *never* vote [and who] should not be counted among voters and possible voters in fixing the basis of suffrage." *Id.* Both opponents and supporters of treating aliens differently from freed slaves agreed that five years was at the longest end of potential waits for the vote. *See id.* at 2939 ("[I]n some of the Northern states the foreigner is denied a vote for five years.") (statement of Sen. Johnson); *id.* at 2987 ("Nearly all the men who come to this country are naturalized in five years.") (statement of Sen. Sherman). Thus, the drafters of the Fourteenth Amendment did not have in mind a conception of aliens as those who might inhabit a state of residency without progress toward citizenship lasting for decades, a picture that, unfortunately, has evolved to become a common reality in 2015.

Most bluntly, Rep. Conkling also admitted that "many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these states are to pass upon the amendment. *It must be made acceptable to them.* For these reasons the committee has adhered to the Constitution as it is, proposing to add to it only so much as is necessary to meet the point aimed at." *Id.* at 359 (emphasis added). *See also id.* at 537 ("I do not think it would be wise to . . . send to the people a proposition to amend the Constitution which would take such Representatives [founded upon noncitizens] from those States, and which therefore they will never adopt.") (statement of Rep. Stevens). The fact that aliens are still retained in the apportionment totals for House members thus may have a great deal more to do with politics (of 1866) than with principle, further weakening the strength of any federal analogy.

4. Aliens are not "virtually represented" by voters who happen to live near them.

The example of the Reconstruction South puts in stark display the absurdity of the notion that geographic proximity will always have a high correlation with political interests. Sometimes the political views of voters and nonvoters who live near each other will be diametrically opposed. And this is still true even when (as has become more frequently the case since courts have aggressively enforced their interpretation of Section 2 of the Voting Rights Act above all other concerns) a district is largely racially homogenous.

This Court has always conditioned an assumption that voters of one race virtually represent other voters of the same race upon an empirical finding that

racial bloc voting is, in fact, already taking place. *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24 (1977) ("[T]he white voter who . . . is in a district more likely to return a nonwhite representative will be represented, *to the extent that voting continues to follow racial lines*, by legislators elected from majority white districts.") (White, J., plurality op.) (emphasis added). This Court's test for determining that a racial group is being electorally underrepresented requires showing "the existence of a correlation between the race of voters and the selection of certain candidates." *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986). But, of course, an examination of voting patterns cannot show the existence of a correlation between the political preferences of voters and nonvoters of the same race. Allowing Texas to assume that its ineligible voters will share the political preferences of eligible voters of the same race would, then, be the first time this Court has endorsed a belief that homogenous racial-bloc political preferences are inevitable and need no empirical verification.

It is plausible that eligible and ineligible voters of the same race would often *not* be identical in political preferences. We can imagine, for example, a hypothetical heavily Hispanic state senate district in Texas. Suppose this district is a mix of nonvoting aliens, recently naturalized citizens, and second-or-third-generation Americans of Spanish descent. On issues such as whether immigration queues to enter the country should be strictly enforced and the extent to which Texas should police its border with Mexico, can we assume the political opinions of everyone in each of these groups will be aligned? Or is it more plausible that a not-insignificant percentage of Hispanic citizens will vote on immigration issues in a way that

is completely opposed to the interests of *nonvoting* Hispanics? If so, counting those alien Hispanics in the total for apportioning voting strength to the *voting* Hispanics near them may hurt their political interests in exactly the same way that counting nonvoting blacks in the apportionment of House members to be elected by southern whites would have harmed the interests of those nonvoting blacks.

Using unfranchised persons to give greater political power to franchised persons is, then, a dangerous game that can cut both ways. Neither the hope that neighbors will always share a desire for local pork projects nor superficial political sterectyping based on race are enough to justify allowing certain citizens to "own the political power" of those who live near them.

5. Concerns for representing nonvoting women are no longer relevant.

Since the enfranchisement of women, the representative concern that actually motivated the drafters of the Fourteenth Amendment no longer carries any weight. Where men spoke for women, biasing representation to states with more males, and therefore more voters, would have underrepresented the (implicit) voices of women in the states in which they lived in greater numbers. There is no analogous principle supporting greater voting power for residents of districts with large numbers of resident aliens. A detailed examination of the history of the passage of the Fourteenth Amendment shows that it outright rejected one claim of virtual representation (that of former slaves) and included aliens for concerns entirely apart from virtual representation, which have no analogy at the state level.

E. The Federal Rule Does Not Result in Voting Strength Disparities of the Same Scale as the Texas Plan

1. The larger size of states naturally inclines them toward heterogeneity.

Finally, it is worth actually comparing the disparities at the inter-state level caused by the federal rule to those caused by Texas's proposed districting plan S172, to see if the *results* are as analogous as Texas claims the *purposes* are. After controlling for the fact that states must be allocated representatives in whole numbers,[2] the following chart shows the five most overrepresented and five most underrepresented states in the House of Representatives in terms of voter population in 2014, along with the U.S. average. (Data from Pew Hispanic, *Mapping the Latino Electorate by State*, http://www.pewhispanic.org/interactives/mapping-the-latino-electorate-by-state/.)

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[2] For example, Montana's population of 1,005,000 receives only one representative, while Rhode Island's population of 1,050,000 receives two, which affects both the figures for representatives per person and representatives per voter. To eliminate the effects of this unrelated issue, the data has been "equalized" to reflect the number of voters each state would have, keeping the ratio of eligible voters to nonvoters in each state the same, if each state's total population were exactly 721,641 people per representative, the national average.

FIGURE 1

State	% Eligible Voters	Eligible Voters per Representative (equalized for rounding issues)	% of Ideal State
California	62.6	451,887	89.3
Texas	63.5	458,257	90.6
Utah	64.2	463,569	91.6
Nevada	66.1	477,084	94.3
Arizona	67.7	488,619	96.6
U.S. Average	70.1	506,002	100
New Hampshire	76.8	553,932	109.5
Montana	77.4	558,644	110.4
Maine	78.6	566,888	112
West Virginia	78.7	567,587	112.2
Vermont	78.8	568,321	112.3

This Court's "decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within th[e] category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). Even if this standard were applied to eligible voter population rather than total population, only five of the fifty states would have disparities from the mean large enough to raise judicial scrutiny (California being the only state that

would receive scrutiny for overrepresentation). None come near the 16.4% discrepancy that "may well approach tolerable limits" of constitutionality in other contexts, even with compelling justifications. *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

2. One fifth of the Texas districts are more malapportioned than the most malapportioned state.

When we compare this to the disparity that arises between districts within Texas, we see that it is a disparity of an entirely different magnitude. Using the most recent CVAP data available, we can once again look at the five most underrepresented and overrepresented districts among the 31 total senate districts drawn up under plan S172. (Data for this and the following chart comes from ACS, *Plan S172 Special Tabulation 2009–2013* ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED116_ACS_Special_Tabulation_2009-2013.pdf).

FIGURE 2

District	% CVAP	CVAP	% of Ideal District
6	47.2	383,985	73.5
27	50.8	399,530	76.5
13	52.9	427,820	81.9
23	57.4	466,660	89.3
29	57.4	469,130	89.8
Texas Average	64.4	522,508	100
1	71.2	583,460	111.7
5	70.7	584,895	111.9

30	72.2	598,630	114.6
25	73.8	602,120	115.2
3	72.5	611,435	117

The Texas plan has a total of 11 out of 31 districts that fall more than 10% above or below the statewide average in CVAP. Four districts fall outside the *Mahan* range of justifiability. Even though there are only 31 districts, compared to 50 states, three districts are more overrepresented than the most overrepresented state, and likewise three districts are more underrepresented than the most underrepresented state. Most strikingly, the plan includes two districts, 6 and 27, that fall below the ideal CVAP by *more than double* the percentage points that California, the most overrepresented state in the country, falls below the ideal U.S. state.

It is true that the districts under plan S172 do vary (all within the well-established 10% range) by *total* population as well as CVAP population, and that part of the disparities in the totals for CVAP are caused by the disparities in total population, not in percent CVAP. The legislature bears more responsibility for these differences in total population than does the U.S. Congress for the disparities caused by the rounding of representatives to states by whole numbers—but even if we again equalize the districts to reflect CVAP they *would have* if their total populations were perfectly equal, we see that barely a dent would be made in the CVAP disparities.

FIGURE 3

District	% CVAP	CVAP (Total Population Equalized)	% of Ideal District
6	47.2	383,166	73.3
27	50.8	411,817	78.8
13	52.9	429,125	82.1
23	57.4	465,196	89
29	57.4	465,951	89.2
Texas Average	64.4	522,508	100
28	71.8	582,436	111.5
30	72.2	585,333	112
24	72.4	587,516	112.4
3	72.5	587,936	112.5
25	73.8	598,707	114.6

3. State boundaries cannot be gerrymandered to create "grossly absurd and disastrous results."

This Court has previously recognized that "grossly absurd and disastrous results would flow" in some cases from using total population to draw state legislative boundaries, such as where military bases fluctuate wildly in population and "permanent residents living in districts including [such] bases might have substantially greater voting power than the electors of districts not including such bases." *Burns v. Richardson*, 384 U.S. 73, 94 & n.24 (1966). A similar issue

is that "[i]neligible incarcerated felons, for instance, are typically counted for apportionment purposes in the prisons where they are incarcerated." Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Children?*, 94 Nw. U. L. Rev. 503, 511 (2000). There will never be a statewide prison or a statewide military base, nor could any politician create one, since the boundaries of states, unlike the boundaries of state legislative districts, cannot be gerrymandered. But without the intervention of this Court in providing a voter-based standard of apportionment for state legislative districts, nothing would prevent a creative legislator from drawing exactly such a district *within* a state, and potentially giving control over the election of a state representative to as small and select a group of voters as he or she wishes. This possibility again draws a stark *dis*analogy between the apportionment rule as it must play out at the federal level, and as it could play out at the state level.

II. "ENFORCING" THE VOTING RIGHTS ACT DOES NOT JUSTIFY ABRIDGING ONE PERSON, ONE VOTE[3]

Once again this Court finds itself at the intersection of the VRA and the Fourteenth Amendment. The parties here are caught in the inevitable trap of (1) maintaining majority-minority districts under complex, overlapping standards and (2) administering electoral schemes that do little to advance racial equality while doing much to violate *voter* equality—the idea that each eligible voter's vote should count

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[3] This argument is set forth in more detail in *amici*'s brief supporting the Appellants' jurisdictional statement, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/evenwel-filed-brief.pdf.

equally. In the background of this conflict lurks a cacophony of precedent and conflicting judicial standards that have arisen from Section 2 cases. Basic constitutional guarantees of equal protection inherent in the Fourteenth Amendment—such as "one person, one vote" (OPOV)—get lost in this thicket.

Avoiding racial discrimination under these circumstances is particularly difficult in jurisdictions where total population and CVAP diverge due to varied concentration of noncitizens. As with the tensions *amicus* Cato has described before, jurisdictions navigating between the VRA's Scylla and the Constitution's Charybdis are bound to wreck individual rights—here, voter equality—on judicial shoals.[4]

Over the years, courts, including this Court, have repeatedly recognized the potential for devaluing individual votes by drawing majority-minority districts in a manner that accords greater weight to minority votes in protected districts and diminishes the relative weight of voters elsewhere. *See, e.g., Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Even the Fifth Circuit recognized this danger while ultimately ruling the other way. *Chen*, 206 F.3d at 528 ("[T]he propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question."). Nevertheless, here the special district court panel adhered to that flawed lower-court precedent—tepidly refusing to acknowledge CVAP as integral to OPOV and thus a requisite element of constitutional

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[4] *Amicus* Cato has previously argued that courts faced a "bloody crossroads" when interpreting Sections 2 and 5 of the VRA. *See, e.g.*, Brief of Cato Inst. as *Amicus Curiae* at 20-28, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); Brief of Cato Inst. as *Amicus Curiae* at 29-32, *Perry v. Perez*, 132 S. Ct. 934 (2012).

equal protection. At least one member of this Court has already recognized the urgency of the problem: "Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined." *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of certiorari).

Section 2 and the Fourteenth Amendment have thus reached an impasse that has been highlighted by a conflict among lower courts' application of OPOV. *See Chen*, 206 F.3d 502; *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Daly v. Hunt*, 93 F.3d 1212; *Garza*, 918 F.2d 763. This Court has clearly left pending a substantial question regarding the continued viability of OPOV and voter equality under the Fourteenth Amendment. Accordingly, this Court should resolve that conflict once and for all—by explaining the proper use of different population metrics and saving OPOV from the judicial morass the VRA has become.

CONCLUSION

For the foregoing reasons, and those described by the Appellants, this Court should reverse the lower court's judgment.

Respectfully submitted,

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